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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

RICHARD S. RODIN *
JOHN G. ROBERTS, JR.
ROBERT CORN-REVERE
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6532
Counsel for Petitioner

* Counsel of Record

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1. Respondents accuse Advanced [1] of not having made in the court below the heightened scrutiny argument it presents in its petition for certiorari. *See* FCC Br. 12; MCI Br. 10-11. That meritless accusation could only have been made by someone who knew that the reader of the petition would not have Advanced's court of appeals briefs on hand.

In the court below, Advanced clearly argued, in every brief it submitted, that the government's financial stake in the decision to revoke Advanced's permit warranted a stricter standard of review. Advanced argued that

> when the Government has a pecuniary interest in the outcome of an adjudication, its decision is not entitled

[1] Petitioner's Rule 29.6 statement appears at Pet. ii.

> to ordinary deference, but rather must receive close judicial scrutiny. *See, e.g., United States* v. *James Daniel Good Real Property*, [510 U.S. 43, 56] 114 S. Ct. 492, 502 (1993) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit") (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 978 n.9 (1991) (opinion of Scalia, J.)). *Cf. United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977) ("[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate [where] the State's [financial] self-interest is at stake"); *United Church of the Medical Center* v. *Medical Comm'n*, 689 F.2d 693, 698-700 (7th Cir. 1982) (agency's financial interest in the outcome of an adjudicatory proceeding held to disqualify agency as decision maker). [Advanced's Opening Br. 28-29; first set of brackets added here].

See also Reply Br. 7-8; Pet. for Reh'g 2-3, 8-10.

The only truth to respondents' protestations is that Advanced did not rely in the court below on some of "the cases on which it now relies." MCI Br. 10.[2] But there is certainly no rule restricting parties in this Court to the same authorities they relied upon below. *Cf. Elder* v. *Holloway*, 510 U.S. 510 (1994). And as this Court has said, the "traditional rule" is that " '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' " *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)). In any event, the argument that Advanced made in the court below is essentially the same as the one it makes here.

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[2] The FCC incorrectly asserts that Advanced has raised a new "due process claim." FCC Br. 12. Advanced's claim is and always has been that the FCC's decision in this case was in violation of the Administrative Procedure Act, 5 U.S.C. § 706, *under which* heightened scrutiny is required for reasons rooted in the Due Process Clause, 47 U.S.C. § 309(j)(7)(A), and the APA itself. *See infra* at 8-5.

2. On the merits of Advanced's heightened scrutiny claim, respondents, using a divide and conquer strategy, argue that neither the Administrative Procedure Act, nor 47 U.S.C. § 309(j)(7)(A), nor the Due Process Clause, standing alone, requires heightened scrutiny of the FCC's decision in this case. *See* FCC Br. 10-16; MCI Br. 8-15. The error in their approach is the examination of each source of law in isolation from the others. As a result, respondents fail to see how the three logically interact to require heightened scrutiny here.

The APA requires a reviewing court to set aside an agency decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). While ordinarily a deferential standard of review, "the intensity of review under this standard is certainly not immutable." *Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983). Indeed, "[m]ore aggressive review under the arbitrary and capricious standard may be appropriate in any number of circumstances." *Id.* at 1425 n.23. *See also National Cable Television Ass'n* v. *Copyright Royalty Tribunal*, 724 F.2d 176, 181 (D.C. Cir. 1983); *Cape May Greene, Inc.* v. *Warren*, 698 F.2d 179, 190 (3d Cir. 1983).

One circumstance in which "[m]ore exacting scrutiny" is appropriate under the APA is when the agency decision under review is infected by bias. *Natural Resources Defense Council, Inc.*, v. *SEC*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979); *Maggard* v. *O'Connell*, 671 F.2d 568, 571 (D.C. Cir. 1982); *Office of Communication*, 707 F.2d at 1425 n.23. In 47 U.S.C. § 309(j)(7)(A), Congress clearly expressed the view that certain FCC decisions should not be based on "the expectation of Federal revenues" from auctions.[8] Congress realized that, without

[8] For an agency decision to pass muster under the APA, "[s]ection 706(2)(A) requires a finding that * * * the decision was based on a consideration of the relevant factors." *Citizens to Preserve*

such a requirement, revenue considerations could improperly bias the FCC's decisions. *See* H.R. Rep. 103-101, 103d Cong., 1st Sess. 258 (1993) (quoted in Pet. 14). Here, the record establishes that in revoking Advanced's permit the FCC expressly factored into its decision the significant revenues that an auction of Advanced's spectrum would realize. *See* Pet. App. 48a & n.127 (noting MCI's opening bid of $175 million for the spectrum); Pet. 10-11.

The Due Process Clause, too, requires heightened scrutiny of the FCC's decision. As explained in the petition, this Court's cases establish that a governmental decisionmaker may not have a pecuniary interest in the outcome of his own decisions. *See* Pet. 15-16.[4] Furthermore, *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), holds "that where there is a danger that an initial decisionmaker is biased, due process requires nondeferential review of its decision." Pet. 18. There, this Court held that to afford a biased decisionmaker "a great deal of deference" upon review of his decision would present "a substantial question of procedural fairness under the Due

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Overton Park, Inc. v. *Volpe*, 401 U.S. 402, 416 (1971). Thus, the APA is violated "if the agency has relied on factors which Congress has not intended it to consider." *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The revenues that an auction of Advanced's spectrum might bring plainly were not relevant to the FCC's decision in this case. *See* 47 U.S.C. § 309(j)(7)(A).

[4] The FCC's claim that this line of cases applies only to informal, unreviewable decisions by solitary decisionmakers (FCC Br. 13-14) is demonstrably false. *See Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986) (decision of nine member state supreme court violated due process); *Gibson* v. *Berryhill*, 411 U.S. 564 (1973) (decision of multimember optometry board violated due process); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61-62 (1972) (rejecting the argument that bias in adjudication by mayor "can be corrected on appeal and trial *de novo* * * * Petitioner is entitled to a neutral and detached judge in the first instance").

Process Clause." 508 U.S. at 625, 626. Neither the FCC nor MCI disputes this.

3. Contrary to respondents' assertions (FCC Br. 13; MCI Br. 11), it is clear that, to have a bias within the meaning of this Court's cases, a governmental decisionmaker need not stand to profit personally and financially from the decision.[6] The test, rather, is whether the governmental adjudicator is "in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true." *Concrete Pipe*, 508 U.S. at 617-618 (quotation marks and ellipses omitted). For the reasons explained in the petition, there can be no doubt here that the FCC had powerful political and institutional reasons to revoke Advanced's permit and auction its spectrum. *See* Pet. 6-7, 16-17.

4. Respondents resort quickly and often to the last refuge of those who would defend indefensible agency action—the presumption of agency regularity. *See* FCC Br. 11, 16-19; MCI Br. 4-7. From their briefs, one would think that the presumption is the end of the analysis, rather than the beginning. The record in this case simply overcomes the initial presumption of proper agency decisionmaking.

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[6] *See Ward*, 409 U.S. at 62 (White, J., dissenting) ("The Ohio mayor who judged this case had no direct financial stake in its outcome."); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 250 (1980) ("the prospect of institutional gain" can cause bias); *Aetna Life*, 475 U.S. at 829-830 (Brennan, J., concurring) ("Nonpecuniary interests" can cause bias; it is enough that the suspect decision "substantially advances the judge's opportunity to attain some desired goal"); *R.L. Augustine Constr. Co.* v. *Peoria Unified Sch. Dist.*, 904 P.2d 462, 467 (Ariz. App. 1995) ("institutional pecuniary interest will violate due process"), *rev. granted* (Oct. 24, 1995); *Trust & Investment Advisers, Inc.* v. *Hogsett*, 43 F.3d 290, 295 (7th Cir. 1994) (this Court's cases "encompass not only those adjudicators with significant, personal financial stakes in the outcome of their cases").

The FCC voted 3-2 to revoke Advanced's permit, with the dissenting votes cast by the two most senior FCC commissioners. The deciding vote was cast by Chairman Reed Hundt, the only commissioner who neither dissented nor wrote separately from the FCC's opinion and order. *Cf. Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 828 (1986) (financially interested state supreme court justice cast "deciding vote" in 5-4 decision). There is substantial evidence that the Chairman's vote was improperly driven by his desire to auction off Advanced's spectrum for hundreds of millions of dollars. As noted in the petition (Pet. 6-7 & n.2, 12), Chairman Hundt has displayed in public statements an undisguised fervor for auction revenues.[6] Although one might dismiss Chairman Hundt's general expressions of his revenue-raising agenda, he expressed the very same views in connection with the auction of Advanced's spectrum itself. *See id.* at 12 (the "who am I kidding?" speech).[7] The Chairman also publicly acknowledged—the day *before* the FCC officially released its decision in this case—that he was influenced by Congress' open desire for the FCC to auction Advanced's spectrum for revenue. *See id.* at 11. It is noteworthy that the FCC does not dispute any of this. *See* FCC Br. 17 n.7. In sum, the record in this case demonstrates a "proba-

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[6] The Chairman's zeal for auction revenues has landed his agency in an enduring icon of popular culture. *See* THE GUINNESS BOOK OF RECORDS 380 (1996 ed.) (noting that the FCC holds the world record for the most lucrative public auction, which occurred on Chairman Hundt's watch in 1995).

[7] Public speeches delivered by federal agency commissioners have been held to constitute proof of unconstitutional bias against a party aggrieved by an agency ruling. *See Antoniu* v. *SEC*, 877 F.2d 721, 724-725 (8th Cir. 1989) (SEC commissioner), *cert. denied*, 494 U.S. 1004 (1990); *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583, 589-592 (D.C. Cir. 1970) (FTC chairman); *Texaco, Inc.* v. *FTC*, 336 F.2d 754, 759-760 (D.C. Cir. 1964) (same), *vacated on other grounds*, 381 U.S. 739 (1965) (per curiam).

bility of actual bias * * * too high to be constitutionally tolerable." *Withrow* v. *Larkin,* 421 U.S. 35, 47 (1975).[8]

5. Respondents fret that acceptance of Advanced's position would require heightened scrutiny of the many governmental decisions implicating revenue collection. *See* FCC Br. 11; MCI Br. 13-14. The horribles that they parade, however, are neither very scary nor apt to march very far. Several things about the FCC's revocation of Advanced's permit set it apart from the garden variety government decision affecting revenue. First, unlike in, say, a Treasury Department tax policy ruling, revenue generation was not a permissible consideration in this case. *See* 47 U.S.C. § 309(j)(7)(A). Second, Advanced has demonstrated more than a general interest on the part of the agency involved in raising revenue. Advanced has shown that the specific agency decisionmaker who cast the deciding vote had a strong interest in reaching the result that would generate revenue. Third, a truly staggering sum of money —$735 million—was at stake here; this sets the case apart from the run-of-the-mill government decision.

In any event, there is much to be said for stricter scrutiny of those decisions in which the government has a pecuniary interest. *See James Daniel Good,* 510 U.S. at 55-56. "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness * * * by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance

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[8] Respondents claim that the extensions the FCC granted after it denied one to Advanced prove that the FCC was not motivated by revenue considerations in this case. *See* FCC Br. 18-19; MCI Br. 6. Those extensions, however, were granted to permittees with spectrum allocations far less valuable than Advanced's. *See* Advanced's C.A. Reply Br. 5.

that the arbiter is not predisposed to find against him." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

6. Finally, the assertion that this case is a "poor candidate" (MCI Br. 3) for review cannot pass without a response. Two of the reasons for the purported poverty of the case—that the decision below was unpublished and unanimous—have not stopped this Court from granting certiorari in other recent cases.[9] These considerations are no impediment to review by this Court. *See Commissioner* v. *McCoy*, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The court of appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished."). MCI's third reason—that "no conflict among the lower courts is even alleged" (MCI Br. 3)—is simply false. In the petition, Advanced explained that the decision below conflicts with the decisions of "other courts recognizing, in a wide variety of contexts, that heightened scrutiny is appropriate when the government has a financial stake in the action under review." Pet. 19 (citing cases). Neither respondent disputes this proposition in its brief; nor could they. *See id.* at 19-21 (discussing the conflict).

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[9] *See, e.g., Lane* v. *Pena*, 116 S. Ct. 2092, 2096 (1996); *Behrens* v. *Pelletier*, 116 S. Ct. 834, 838 (1996); *Things Remembered, Inc.* v. *Petrarca*, 116 S. Ct. 494, 496 (1995); *Williamson* v. *United States*, 114 S. Ct. 2431, 2434 (1994); *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994); *MCI Telecomm. Co.* v. *AT&T*, 114 S. Ct. 2223, 2228 (1994); *Ibanez* v. *Florida Dep't of Bus. & Prof'l Reg.*, 114 S. Ct. 2084, 2088 (1994); *Howlett* v. *Birkdale Shipping Co.*, 114 S. Ct. 2057, 2062 (1994); *Farmer* v. *Brennan*, 114 S. Ct. 1970, 1976 (1994).

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD S. RODIN *
JOHN G. ROBERTS, JR.
ROBERT CORN-REVERE
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6532
Counsel for Petitioner

* Counsel of Record